STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 14, 2007
v	No. 266616 Kent Circuit Court
CURTIS ROY GREEN, SR., Defendant-Appellant.	LC No. 05-005244-FH

Before: Kelly, P.J., and Markey and Smolenski, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of first-degree criminal sexual conduct ("CSC-I"), MCL 750.520b(1)(f); two counts of second-degree criminal sexual conduct ("CSC-II"), MCL 750.520c(1)(f); two counts of third-degree criminal sexual conduct ("CSC-III"), MCL 750.520d(1)(d), and two counts of fourth-degree criminal sexual conduct ("CSC-IV"), MCL 750.520e(1)(d). The trial court sentenced defendant to 15 to 50 years' imprisonment for his CSC-I convictions and to a concurrent term of 10 to 15 years' imprisonment for his CSC-II convictions. The trial court vacated defendant's CSC-III and CSC-IV convictions. We affirm defendant's convictions but remand for resentencing and correction of the judgment of sentence.

I

Defendant contends that the prosecutor's failure to allege specific dates for the charged offenses deprived him of due process of law and of his right to present a defense. The original felony information alleged that the charged offenses occurred in Kent County "on or about 04/01/2004 to 09/30/2004." Defendant failed to object to the information before trial as required by MCL 767.76. At trial, the parties agreed to amend the information to provide that the charged offenses occurred in Kent County "between November 21, 2003, and September 30, 2004." A defendant may not assign error on appeal to something his own counsel deemed appropriate at trial. *People v Green*, 228 Mich App 684, 691; 580 NW2d 444 (1998). "To do so would allow defendant to harbor error as an appellate parachute." *Id.* Because defense counsel expressed satisfaction with this change, defendant has waived this issue on appeal. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).

Nonetheless, we find that the information was sufficient to apprise defendant of the nature and severity of the charges against him. *People v Darden,* 230 Mich App 597, 601-602;

585 NW2d 27 (1998). The evidence demonstrated that the prosecutor identified the date of the offenses to the best of his knowledge after undertaking a reasonably thorough investigation. The victim testified that defendant had been sexually abusing her since she was approximately five years old. "Thus, it is conceivable that specific dates would not stick out in her mind." *People v Naugle*, 152 Mich App 227, 235; 393 NW2d 592 (1986). Moreover, the prosecutor need only state the time of an offense "as near as may be." MCL 767.45(1)(b). Finally, in the context of this case, the actual date of the offenses was not essential to the crimes alleged. See *Naugle*, *supra* at 235.

II

Defendant also contends that the trial court erred in failing to sever the charged offenses for trial. Defendant did not object to the joinder of the offenses. Therefore, this issue is unpreserved. *Green*, *supra* at 690-691. We review unpreserved issues for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Defendant has the burden of establishing that he was prejudiced by the error, i.e., that the error affected the outcome of the lower court proceedings. *Id.* Reversal is warranted only if the plain error resulted in the conviction of an innocent defendant or affected the fairness, integrity or public reputation of the judicial proceedings. *Id.*

Contrary to defendant's assertion, the trial court was not required to sever the offenses on its own initiative. MCR 6.120(B) provides that, "[o]n its own initiative, . . . the court *may* . . . sever offenses charged in a single information" (emphasis added). The court rule's use of the word "may" indicates that it is discretionary. *People v Brown*, 249 Mich App 382, 386; 642 NW2d 382 (2002). While a trial court may sever related offenses in certain circumstances, it is not required to do so. *People v Duranseau*, 221 Mich App 204, 208; 561 NW2d 111 (1997). Here, joinder was appropriate because the charged offenses were based on a series of acts constituting parts of defendant's scheme or plan to engage in sexual activity with the victim whenever the opportunity arose. MCR 6.120(B)(1)(c); *People v Miller*, 165 Mich App 32, 45; 418 NW2d 668 (1987). "[J]oinder is allowed for offenses which are part of a single scheme, even if considerable time passes between them." *People v Tobey*, 401 Mich 141, 152 n 15; 257 NW2d 537 (1977).

Moreover, defendant failed to establish that a different outcome was likely had the charges been severed and separate trials held. We note that if separate trials were held in this case, evidence of other charges would have been admissible in each of the separate trials to prove a relevant proper purpose. MRE 404(b); *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993). Because the evidence pertaining to the other charges, which defendant believes caused him prejudice, would have been admissible in each of the trials, defendant failed to establish that he was prejudiced by the trial court's failure to sever the offenses. See *People v Girard*, 269 Mich App 15, 18; 709 NW2d 229 (2005); *Duranseau*, *supra* at 208.

III

Defendant next challenges both the sufficiency of the evidence and the trial court's denial of his motion for new trial based on the great weight of the evidence. In reviewing a challenge to the sufficiency of the evidence, we must determine whether, viewing the evidence in the light favorable to the prosecution, a rational trier of fact could conclude that the prosecution proved all

the essential elements of the crime beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000). The standard of review is deferential; therefore, this Court must draw all reasonable inferences and resolve credibility conflicts in favor of the jury verdict. *Id*. at 400. We review a trial court's ruling on a motion for a new trial based on the claim that the verdict was against the great weight of the evidence for an abuse of discretion. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). "The test to determine whether a verdict is against the great weight of the evidence is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *People v Musser*, 259 Mich App 215, 218-219; 673 NW2d 800 (2003).

To sustain defendant's CSC-I convictions, the prosecution was required to prove beyond a reasonable doubt that (1) defendant engaged in sexual penetration on two instances, (2) that defendant used force or coercion to accomplish the penetrations, and (3) that defendant caused personal injury to the victim. MCL 750.520b(1)(f). Viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could conclude that the prosecution proved all the essential elements of CSC-I beyond a reasonable doubt.

"Sexual penetration" includes "any . . . intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body." MCL 750.520a(o). The victim's testimony that defendant got on top of her and put his penis inside of her vagina two or three times per week was sufficient evidence from which a jury could infer that two instances of sexual penetration occurred in this case. *People v Robideau*, 94 Mich App 663, 674; 289 NW2d 846 (1980).

"Force or coercion is not limited to physical violence but is instead determined in light of all the circumstances." *People v Reid*, 233 Mich App 457, 468; 592 NW2d 767 (1999). See MCL 750.520b(1)(f). "[A] defendant's conduct constitutes coercion where . . . the defendant abuses his position of authority to constrain a vulnerable victim by subjugation to submit to sexual conduct." *People v Knapp*, 244 Mich App 361, 369; 624 NW2d 227 (2001). The victim testified that before defendant engaged in sex with her, he would ask her to take her clothes off, or he would take her clothes off himself. He asked her not to tell anyone about the sexual abuse and told her that if she did, he would go to prison for a long time. He purchased a car and other items for her so that she would cooperate with him and not report his actions. The victim's testimony was sufficient to prove that defendant used coercion to accomplish the sexual penetration through the abuse of his position of authority, i.e., his position as her father. Furthermore, the evidence was sufficient to prove beyond a reasonable doubt that defendant forced himself upon the victim, without regard to her wishes, where her lack of consent was clear and she was isolated from help. *People v Kline*, 197 Mich App 165, 167; 494 NW2d 756 (1992).

"Personal injury" means "bodily injury, disfigurement, mental anguish, chronic pain, pregnancy, disease, or loss or impairment of a sexual or reproductive organ." MCL 750.520a(m). To prove mental anguish, "the prosecution is required to produce evidence from which a rational trier of fact could conclude, beyond a reasonable doubt, that the victim experienced extreme or excruciating pain, distress, or suffering of the mind." *People v Petrella*, 424 Mich 221, 259; 380 NW2d 11 (1985). "The record must contain either direct evidence of intensified mental suffering, such as specific testimony on the point from the victim, or perhaps circumstantial evidence of such suffering, as an inference properly to be drawn from other facts in the record." *Id.* at 275. But the evidence of mental anguish need not be overwhelming.

People v Himmelein, 177 Mich App 365, 377; 442 NW2d 667 (1989). The victim testified that although the sexual abuse began when she was five or six years old, she was too afraid to report the abuse until she was in high school. At the time of trial, she was attending counseling sessions, and she felt angry and humiliated about what defendant did to her. She also testified that as a result of defendant's actions, she stayed in her room a lot, "didn't want to be around any guys by [her]self," and frequently cried herself to sleep. Further, trial testimony established that the victim became alienated from her entire family after she made the allegations of sexual abuse against defendant. Viewing the evidence in the light most favorable to the prosecution, the victim's testimony was sufficient evidence from which the jury could have concluded beyond a reasonable doubt that the victim experienced extreme distress or suffering of the mind.

To sustain defendant's CSC-II convictions, the prosecutor was required to prove beyond a reasonable doubt that (1) defendant engaged in sexual contact with the victim on two instances, (2) that defendant used force or coercion to accomplish the sexual contact, and (3) that defendant caused personal injury to the victim. MCL 750.520c(1)(f). Viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could conclude that the prosecution proved all the essential elements of CSC-II beyond a reasonable doubt.

"Sexual contact" includes "the intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification." MCL 750.520a(n). The victim's testimony is sufficient evidence from which a jury could infer that two instances of sexual contact occurred in defendant's car, where she masturbated defendant's penis with her hand. See *People v Alter*, 255 Mich App 194, 202-203; 659 NW2d 667 (2003).

The victim also testified that defendant referred to the sexual acts as "helping him." On one occasion, he locked the bedroom door and told her "the only way [she] could go to [her] boyfriend's house [was] if she 'helped' him." She complied, so he allowed her to stay at her boyfriend's house for one extra hour. Defendant asked her not to tell anyone about the sexual contact and told her that if she did, he would go to prison for a long time. He also purchased a car and other items for her so that she would cooperate with him and not tell anyone about his actions. Defendant's conduct constituted coercion. He abused his position of authority "to constrain a vulnerable victim by subjugation to submit to sexual conduct." *Knapp, supra* at 369. Moreover, nothing indicates that the victim gave defendant permission to have sexual contact with her, and the sexual contact occurred in the car where the victim was isolated from help. Under these circumstances, viewing the evidence in a light most favorable to the prosecution, the evidence was sufficient for a rational trier of fact to find that defendant used force or coercion to accomplish the sexual contact.

Finally, as discussed above, the prosecutor presented sufficient evidence from which the jury could have concluded beyond a reasonable doubt that defendant caused the victim to suffer mental anguish.

In arguing to the contrary, defendant contends that the victim's testimony was not credible, so the evidence was not sufficient to support his convictions. First, the prosecutor was not required to corroborate the victim's testimony. MCL 750.520h. "A complainant's eyewitness testimony, if believed by the trier of fact, is sufficient evidence to convict." *People v*

Newby, 66 Mich App 400, 405; 239 NW2d 387 (1976). Second, in determining whether sufficient evidence has been presented, we will not interfere with the trier of fact's role in determining the weight of the evidence or the credibility of witnesses. *People v Williams*, 268 Mich App 416, 419; 707 NW2d 624 (2005). We must resolve all conflicts in the evidence in favor of the prosecution. *Nowack, supra* at 400.

Defendant's argument that the verdict was against the great weight of the evidence parallels his argument regarding the sufficiency of the evidence. "Conflicting testimony, even when impeached to some extent, is an insufficient ground for granting a new trial." *People v Lemmon*, 456 Mich 625, 647; 576 NW2d 129 (1998). Here, although defendant elicited testimony from some witnesses that was inconsistent with the victim's testimony, we cannot say that the victim's testimony was impeached to the extent that it was deprived of all probative value or that it was contradicted by indisputable physical facts. *Id.* at 646. Defendant failed to "establish that an innocent person had been found guilty, or that the evidence preponderates heavily against the verdict so that it would be a miscarriage of justice to permit the verdict to stand." *Id.* at 647. Thus, the trial court did not err in denying his motion for a new trial.

IV

Defendant next challenges several of the trial court's evidentiary rulings. We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). "[A]n abuse of discretion standard acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome." *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). "When the trial court selects one of these principled outcomes, the trial court has not abused its discretion and, thus, it is proper for the reviewing court to defer to the trial court's judgment." *Id*. We review unpreserved issues for plain error affecting substantial rights. *Carines*, *supra* at 763.

Defendant contends that the trial court erred in admitting evidence concerning the sexual abuse that allegedly occurred in Arkansas. Defendant also contends that the trial court erred in admitting testimony concerning an investigation conducted by Barry County law enforcement into allegations of sexual abuse that occurred there. Defendant did not object the admission of this evidence at trial. Plaintiff offered the evidence to prove defendant's plan or scheme in committing criminal sexual acts against the victim. Thus, the evidence was offered for a proper purpose under MRE 404(b)(1). A proper purpose is a purpose other than one that establishes the defendant's character in order to show his propensity to commit the offense. *VanderVliet, supra* at 62-64. Moreover, the evidence was relevant to a determination of an issue of fact of consequence at trial. *VanderVliet, supra* at 74. Evidence that is essential to provide the jury with an intelligible presentation of the full context in which disputed events occurred is admissible even if it implicates defendant in other crimes or wrongs. *People v Sholl*, 453 Mich 730, 741; 556 NW2d 851 (1996). Furthermore, the trial court instructed the jury as follows:

> In this matter, you have heard evidence that was introduced to show that the defendant has engaged in improper sexual conduct for which he is not on trial. If you believe this other evidence, you must be very careful to consider it for only one limited purpose; that is, to help you judge the believability of testimony regarding the acts for which defendant is now on trial. You must not consider this

> evidence for any other purpose. For example, you must not decide that it shows the defendant is a bad person or that the defendant is likely to commit crimes. You must not convict the defendant here because you think he is guilty of other bad conduct.

This instruction limited any unfair prejudice stemming from the admission of the evidence. Thus, defendant failed to establish that the trial court abused its discretion in admitting the evidence.

Defendant also contends that the trial court erred in instructing the jury to disregard one witness's testimony that she became concerned when she found condoms in the victim's purse. The prosecutor objected to the testimony on the basis that it was violative of the rape shield statute, MCL 750.520j. The record reflects that defense counsel agreed that the trial court should instruct the jury to disregard the testimony. Defendant cannot now assert that the trial court's decision was erroneous. A defendant may not assign error on appeal to something his own counsel deemed appropriate at trial. *Green, supra* at 691.

Finally, defendant contends that the trial court erred in permitting a Child Protective Services (CPS) worker to testify regarding the victim's reaction to the events she testified about, and whether that reaction affected the worker's perception of the victim's credibility. Defense counsel objected on the basis that the question asked for an opinion, and the witness had not been offered as an expert. On appeal, defendant now argues that the worker's testimony was not relevant, but if it were, it was more prejudicial than probative. Defendant also argues for the first time on appeal that the question was improper because it called for one witness to comment on the credibility of another witness. Because defendant did not assert these grounds for objection in the trial court, they are not preserved for appeal. MRE 103(a)(1); *Aldrich, supra* at 113 (the grounds for objection at trial and the grounds raised on appeal must be the same). We review unpreserved issues for plain error affecting substantial rights. *Carines, supra* at 763.

Although it is not proper for one witness to comment on the credibility of another witness, *People v Dobek*, 274 Mich App 58, 71; ____ NW2d ____ (2007), we do not find that defendant's substantial rights were affected by the admission of the CPS worker's testimony. First, because the CPS worker was testifying based on her knowledge, experience, and training, "it would appear that [her] testimony constituted expert opinion testimony and not lay opinion testimony under MRE 701." *Id*. at 77. In child sexual abuse cases, "(1) an expert may not testify that the sexual abuse occurred, (2) an expert may not vouch for the veracity of a victim, and (3) an expert may not testify whether the defendant is guilty." *People v Peterson*, 450 Mich 349, 352; 537 NW2d 857 (1995). However, "an expert may testify with regard to the consistencies between the behavior of the particular victim and other victims of child sexual abuse to rebut an attack on the victim's credibility." *Id.* at 352-353. Here, the CPS worker testified regarding the consistencies between the victim's behavior and the behavior of other victims of sexual abuse to rebut what the prosecutor and the trial court perceived as an attack on the victim's credibility. Thus, the trial court did not abuse its discretion in admitting the testimony. *Dobek, supra.* Moreover, in light of the other evidence introduced at trial, any error in the admission of the testimony was harmless as we believe that it "did not tip the scales in favor of a guilty verdict." *People v Smith*, 456 Mich 543, 555 n 5; 581 NW2d 654 (1998).

V

On appeal, defendant also raises several issues of prosecutorial misconduct. In general, "[t]his Court reviews claims of prosecutorial misconduct case by case, examining the remarks in context, to determine whether the defendant received a fair and impartial trial." *Aldrich*, *supra* at 110. Here, defendant did not object to the challenged actions at trial. Therefore, our review is limited to whether plain error affected defendant's substantial rights. *Id.* We will reverse "only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Carines*, *supra* at 774.

Defendant first contends that the prosecutor improperly elicited testimony regarding an altercation that occurred between the victim's boyfriend and one of the victim's male relatives after the victim accused defendant of sexual abuse. Defendant failed to assert how he was prejudiced by this testimony, which did not implicate him in any way. "Error warranting reversal does not occur where a defendant fails to articulate how he was harmed." *People v Ackerman*, 257 Mich App 434, 450; 669 NW2d 818 (2003).

Defendant also contends that the prosecutor improperly asked defendant's witnesses whether they were aware of the statement that defendant made regarding the Arkansas incident. "The prosecutor's good-faith effort to admit evidence does not constitute misconduct." *Id*. at 448. No basis exists to conclude that the prosecutor offered the evidence in bad faith. The evidence regarding the Arkansas incident was admissible under MRE 404(b), and the trial court instructed the jury regarding the proper use of the evidence. Had defendant objected to the admission of the evidence at trial, the trial court could have given a further cautionary instruction. See *People v Lee*, 212 Mich App 228, 246; 537 NW2d 233 (1995).

Defendant next contends that the prosecutor misstated the law during voir dire, when he questioned potential jurors regarding the notions of credibility and reasonable doubt. "A prosecutor's clear misstatement of the law that remains uncorrected may deprive a defendant of a fair trial." *People v Grayer*, 252 Mich App 349, 357; 651 NW2d 818 (2002). "However, if the jury is correctly instructed on the law, an erroneous legal argument made by the prosecutor can potentially be cured." *Id*. Here, viewed in context, the prosecutor's questions were not improper. It is axiomatic that jurors, as the triers of fact, determine the credibility of witnesses. *Lemmon*, *supra* at 637. Moreover, defendant does not contend that the trial court improperly instructed the jury regarding credibility or reasonable doubt during trial. Further, the trial court instructed the jurors that they must decide the facts, and that the statements of counsel were not evidence. The trial court's instructions were sufficient to cure any erroneous legal argument made by the prosecutor. The jury is presumed to follow the instructions of the court. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Defendant also contends that, in his closing argument, the prosecutor improperly vouched for the victim's credibility, asked the jury to render a verdict out of sympathy for the victim, and asserted a civic duty argument. A prosecutor may not appeal to the jury to sympathize with the victim, *People v Abraham*, 256 Mich App 265, 273; 662 NW2d 836 (2003), or to convict on the basis of their civic duty, *Ackerman*, *supra* at 452. But we must evaluate the prosecutor's remarks in light of the relationship or lack of relationship they bear to the evidence admitted at trial. *Id*. Viewed in context, the prosecutor's closing argument did not rise to the level of an appeal to juror sympathy or to the level of an improper civic duty argument. Moreover, the trial court instructing the jury that it had to decide the case on the evidence and that the attorneys'

arguments were not evidence was sufficient to eliminate any prejudice that might have resulted from the prosecutor's comments. See *Abraham*, *supra* at 276; *Grayer*, *supra* at 357.

Additionally, a prosecutor may not vouch for the credibility of witnesses by claiming some special knowledge with respect to their truthfulness. "But a prosecutor may comment on his own witnesses' credibility during closing argument, especially when there is conflicting evidence and the question of the defendant's guilt depends on which witnesses the jury believes." *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004). Considering the prosecutor's challenged closing remarks in context, it is apparent the prosecutor was not implying that he had some special knowledge of the victim's truthfulness. Throughout his closing argument, the prosecutor argued to the jury that the evidence in the case proved beyond a reasonable doubt that defendant was guilty of the charged offenses. His challenged argument was based on the evidence presented in the case and the reasonable inferences arising from the evidence. Thus, his argument was proper. "A prosecutor may not make a statement of fact to the jury that is unsupported by the evidence, but she is free to argue the evidence and any reasonable inferences that may arise from the evidence." *Ackerman*, *supra* at 450.

Finally, defendant has failed to establish that, "although defendant was actually innocent, the plain error caused him to be convicted" or that "the error 'seriously affected the fairness, integrity, or public reputation of judicial proceedings,' regardless of his innocence." *Thomas*, *supra* at 454 (citation omitted). In light of the victim's testimony and the other evidence of defendant's guilt presented at trial, we do not believe that the prosecutor's remarks were "of a character likely to have prejudiced defendant's rights, or to have influenced the jury improperly." *People v Morehouse*, 328 Mich 689, 692-693; 44 NW2d 830 (1950). Thus, defendant is not entitled to relief on this issue.

VI

Defendant contends that the trial court erred in scoring 15 points under offense variable ("OV") 8, MCL 777.38, and 50 points under OV 11, MCL 777.41. Defendant preserved this issue for appeal by raising it in his motion for resentencing. MCL 769.34(10); *People v Kimble*, 470 Mich 305, 310-311; 684 NW2d 669 (2004). We review de novo issues concerning the proper application of the statutory guidelines, *People v Hegwood*, 465 Mich 432, 436; 636 NW2d 127 (2001), but review the trial court's factual findings for clear error, *Babcock*, *supra* at 264-265. Nevertheless, a trial court has discretion in scoring the guidelines, provided the record adequately supports a particular score. *People v Cox*, 268 Mich App 440, 453-454; 709 NW2d 152 (2005).

In calculating a sentencing guidelines range, a court must assess fifteen points under OV 8 if the "victim was asported to another place of greater danger or to a situation of greater danger . . . ." MCL 777.38(1)(a). In this case, the victim testified that sexual acts occurred in defendant's car because there were too many people living in their home. On one occasion, defendant drove her to a parking lot, at night, where sexual acts occurred. "[I]n light of the sexual acts that subsequently occurred there, the transportation of the victim was to a place of greater danger." *Cox*, *supra* at 454. Further, trial testimony supported the conclusion that "the crimes could not have occurred as they did without the movement of defendant and the victim[ ] to a location where they were secreted from observation by others." *People v Spanke*, 254 Mich

App 642, 648; 658 NW2d 504 (2003). Thus, the trial court did not abuse its discretion in scoring 15 points under OV 8. See *People v Phillips*, 251 Mich App 100, 108; 649 NW2d 407 (2002).

In calculating a sentencing guidelines range, a court must score 50 points under OV 11 if "[t]wo or more criminal sexual penetrations occurred." MCL 777.41(1)(a). In this case, defendant was convicted of two counts of CSC-I, each based on a separate sexual penetration of the victim. The trial court was precluded from scoring points under OV 11 for the one penetration that formed the basis of each CSC-I offense. MCL 777.41(2)(c); *Cox, supra* at 456. And, there was no evidence that more than one penetration occurred during any one incident underlying defendant's CSC-I convictions. Cf. *People v Matuszak*, 263 Mich App 42, 61; 687 NW2d 342 (2004). Further, no evidence established that the penetrations that formed the bases for defendant's CSC-I convictions arose out of each other. See *People v Johnson*, 474 Mich 96, 102; 712 NW2d 703 (2006) ("[t]here is no evidence that the penetrations resulted or sprang from each other or that there is more than an incidental connection between the two penetrations"). Thus, the evidence in this case did not support the scoring of any points under OV 11.

Criminal sexual penetrations extending beyond the sentencing offense may be scored under OV 12 (contemporaneous felonious criminal acts that occurred within 24 hours of the sentencing offense and that have not and will not result in separate convictions), MCL 777.42, or OV 13 (continuing pattern of criminal behavior), MCL 777.43. *Johnson, supra* at 102 n 3. There was insufficient evidence from which to conclude that any of the criminal sexual penetrations occurred within 24 hours of each other. Thus, OV 12 did not apply in this case. *Id.* But, the trial court should have scored the criminal sexual penetrations under OV 13.

In calculating a sentencing guidelines range, a court must score 25 points under OV 13 if the "offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person." MCL 777.43(1)(b). In scoring OV 13, "all crimes within a 5-year period, including the sentencing offense, shall be counted *regardless of whether the offense resulted in a conviction.*" MCL 777.43(2)(a) (emphasis added). Defendant's concurrent convictions for CSC-I and CSC-II, in addition to the evidence from which the trial court could reasonably have concluded that defendant committed additional felonious criminal sexual acts against the victim within a 5-year period, would have supported the scoring of 25 points under OV 13 in this case. "Because defendant's sentences are predicated upon an inaccurate calculation of the guidelines range, defendant is entitled to be resentenced." *Johnson, supra* at 103. See also *People v Francisco*, 474 Mich 82, 89-91; 711 NW2d 44 (2006).

We reject defendant's argument that he was sentenced in violation of *Blakely v Washington*, 542 US 296, 301; 124 S Ct 2531; 159 L Ed 2d 403 (2004). Our Supreme Court has definitively held that "'the Michigan system is unaffected by the holding in *Blakely* . . . .'" *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006), quoting *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004).

VII

Finally, defendant argues that he was denied the effective assistance of counsel. Defendant asserts counsel erred with respect to issue we have already discussed, including, (1) failing to move for a separate trial on each count; (2) failing to move for a directed verdict at trial; and (3) failing to object to some of the prosecutor's remarks. Defendant also asserts

counsel erred at sentencing. We reject this argument, either because defendant has not established that trial errors occurred, or because the alleged errors were not outcome determinative. "To prevail on a claim of ineffective assistance, a defendant must, at a minimum, show that (1) counsel's performance was below an objective standard of reasonableness and (2) a reasonable probability that the outcome of the proceeding would have been different but for trial counsel's errors." *Ackerman*, *supra* at 454. "[C]ounsel does not render ineffective assistance by failing to raise futile objections." *Id*.

Defendant also contends that defense counsel was ineffective for failing to object to the scoring of OV 8 and OV 11 at the sentencing hearing. However, defense counsel objected to the trial court's scoring of OV 8 and OV 11 in the motion for resentencing. Thus, defendant cannot establish that that he was prejudiced by defense counsel's failure to object to the scoring of the sentencing guidelines at the initial sentencing hearing.

Further, defense counsel was not ineffective for failing to request a sentence near the middle of the sentencing guidelines range. At the sentencing hearing, defense counsel asserted that defendant maintained his innocence in this case, but he made no recommendation regarding defendant's sentence. "The decision to address the court at sentencing is a tactical one." *People v Arney*, 138 Mich App 764, 766; 360 NW2d 291 (1984). Defendant cannot show "that counsel's performance fell below an objective standard of reasonableness and that, but for defense counsel's errors, there was a reasonable probability that the result of the proceeding would have been different." *Ackerman*, *supra* at 454.

VIII

We affirm defendant's convictions but remand for resentencing and for correction of the judgment of sentence.[1] We do not retain jurisdiction.

/s/ Kristen Frank Kelly
/s/ Jane E. Markey
/s/ Michael R. Smolenski

[1] The judgment of sentence incorrectly states that defendant was convicted of four counts of CSC-I, two counts of CSC-II, one count of CSC-III, and one count of CSC-IV. The judgment of sentence should reflect that defendant was convicted of two counts of CSC-I, two counts of CSC-II, two counts of CSC-III, and two counts of CSC-IV, and that the trial court vacated defendant's CSC-III and CSC-IV convictions. We remand for correction of the judgment of sentence consistent with the record. See *People v McCray*, 245 Mich App 631, 644; 630 NW2d 633 (2001).